

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHIRLEY MEEKS)	
Claimant)	
VS.)	
)	
ESSEX GROUP)	Docket No. 170,265
Respondent)	
AND)	
)	
NATIONAL UNION FIRE INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The Workers Compensation Fund (Fund) appeals from an Award entered by Administrative Law Judge Bruce E. Moore, dated April 15, 1997. Oral arguments were made to the Appeals Board on October 1, 1997.

APPEARANCES

Claimant appeared by telephone and by her attorney, John M. Russell of Great Bend, Kansas. Respondent and its insurance carrier did not appear. The Fund appeared by its attorney, Kent Roth of Great Bend, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties listed in the Award of the Administrative Law Judge are adopted by the Appeals Board for this review.

ISSUES

The issue for determination by the Appeals Board is the nature and extent of claimant's disability. The Fund attempted also, to raise an issue concerning its entitlement to a setoff or credit under K.S.A. 44-510a. However, that issue was abandoned by respondent and the Fund at the August 24, 1995, oral argument before the Board. It was not an issue before the Administrative Law Judge on remand and, accordingly, cannot now be raised as an issue before the Board on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds that the Award entered by the Administrative Law Judge should be affirmed. The findings of fact and conclusions of law as enumerated in the Award are found to be accurate and are hereby adopted by the Appeals Board as if specifically set forth herein.

The Appeals Board agrees with the finding by the Administrative Law Judge that claimant has proven that her work for respondent aggravated, accelerated and intensified claimant's low back condition and the resulting disability is compensable. The Appeals Board further agrees that, in light of the restrictions imposed by Dr. Edward J. Prostic and Dr. C. Reiff Brown, claimant is entitled to an award based on work disability. Pursuant to Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), permanent partial general disability should be determined by the extent (percentage) of reduction of the employee's ability to perform work in the open labor market and the employee's ability to earn a comparable wage. Both prongs of this two-part test were properly considered in the testimony of Mr. James Molski in light of the employee's education, training, experience and capacity for rehabilitation. K.S.A. 1991 Supp. 44-510e(a).

Giving due weight to the restrictions imposed by Dr. Prostic and Dr. Brown and the uncontroverted opinions of claimant's vocational expert, Mr. Molski, as to claimant's post-accident ability to earn a comparable wage in the open labor market and claimant's labor market loss, we agree with the Administrative Law Judge and find the claimant to have sustained a 54.5 percent work disability. This percentage takes into consideration the extent to which the claimant's present limitations and restrictions are attributable to her prior injury. See Miner v. M. Bruenger & Co., Inc., 17 Kan. App. 2d 185, 836 P.2d 19 (1992).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated April 15, 1997, should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Russell, Great Bend, KS
Jerry M. Ward, Great Bend, KS
Kent Roth, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director